

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**VERNON FRANK HARGRAVES**

Claimant

VS.

**GOODYEAR TIRE & RUBBER CO.**

Respondent

AND

**LIBERTY MUTUAL INSURANCE CO.**

Insurance Carrier

Docket No. 1,022,008

**ORDER**

Respondent and its insurance carrier request review of the May 27, 2005, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bryce D. Benedict.

**ISSUES**

The ALJ found that claimant incurred a physical injury which triggered an overt manifestation of a psychiatric problem that resulted in claimant leaving his employment. The ALJ found that claimant was entitled to medical treatment and temporary total disability (TTD) benefits. But the ALJ also found that because the treating psychiatrist opined claimant's condition is one that will continue for an indefinite period of time, claimant is only entitled to TTD benefits until April 13, 2005, the date of Dr. Ira Silverman's letter.

The respondent and its insurance carrier request review of the ALJ's findings that claimant's accidental injury arose out of and in the course of his employment and that claimant is entitled to TTD compensation. In the alternative, the respondent and its insurance carrier ask the Appeals Board to determine if the ALJ exceeded his jurisdiction by finding that claimant suffered an accidental injury arising out of and in the course of his employment and that claimant's psychiatric symptoms are directly traceable to an injury on the job.

Claimant argues that the ALJ's award should be upheld in all respects as to compensability. Claimant also argues that TTD benefits should be awarded on an ongoing basis, claiming that even though Dr. Silverman could not predict with certainty when claimant could return to work, claimant's condition is improving and is not static. Claimant requests that TTD benefits be continued until his treating physician finds he has reached maximum medical improvement.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant is a Vietnam veteran who has been working for respondent since May 1985. Claimant has a sensitivity to perfumes, cologne, soap, scented candles, potpourri, deodorants and deodorizers, and being around the smells of those items gives him migraine headaches, nausea and burning eyes, throat and nose. Claimant claims that beginning in September 2004, a coworker, Robert Ramirez, began spraying deodorants and bathroom deodorizers in claimant's work area, causing him to have headaches and nausea. Claimant claims that Mr. Ramirez knew those smells caused him to have reactions but continued to spray the deodorizers in the work area.

Mr. Ramirez began working on claimant's shift sometime in 2003. Mr. Ramirez had more seniority in the department than claimant, but claimant had worked longer on that shift. Claimant testified that the last person on the shift does the open job, and the open job on his shift was the trucking job. Nevertheless, claimant testified that Mr. Ramirez believed that since he had seniority, claimant should have been forced to take the trucking job. Claimant testified that Mr. Ramirez resented this job assignment and eventually transferred out of claimant's department.

Claimant testified that in December 2003, Mr. Ramirez came up to him at work and called him some names. Claimant, in return, called Mr. Ramirez a name and told him if he wanted they could "tie it up right there."<sup>1</sup> Mr. Ramirez responded by telling claimant if he had wanted to kill claimant, he could have done it that morning by running him off the road. Claimant reported this incident to his supervisor, resulting in claimant and Mr. Ramirez meeting together with claimant's supervisor and the business center manager. Also, two union representatives were there. Both claimant and Mr. Ramirez were told to leave the facility for the day to cool off. After that incident, Mr. Ramirez began pulling childish pranks on claimant at work. Then, in May 2004, another incident occurred wherein claimant was expecting a telephone call from his wife about the condition of his father-in-law, who was in the hospital. When claimant's wife called for claimant at the plant, Mr. Ramirez answered the phone and told her that claimant was not at work and had not been there for

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<sup>1</sup>Hargraves Depo. at 43.

a long time. Claimant confronted Mr. Ramirez about this the next day, and Mr. Ramirez denied he had talked to claimant's wife. Claimant then threatened Mr. Ramirez with physical assault, but Mr. Ramirez left the area. Claimant also reported this incident to his supervisor.

Beginning in September 2004, claimant began noticing the odor of bathroom disinfectant and deodorizers in his work area when he got to work. Claimant asked around and was told that someone had seen Mr. Ramirez spraying in claimant's workplace. Claimant also claimed that Mr. Ramirez would take the cap off a Wick Deodorizer and pour it around the workplace. Claimant claimed that one day in October 2004, he left for a doctor's appointment and two of his co-workers were on break. When his co-workers came back from break, someone had poured some Wick Deodorizer into a file cabinet. When claimant returned the next day, he removed the file cabinet and took it out of the room, but later saw Mr. Ramirez return the file cabinet. Claimant's supervisor made Mr. Ramirez remove the file cabinet again. However, when claimant showed up for work the next day, the file cabinet was again in the workplace. Claimant believes that Mr. Ramirez' brother, Gilbert Ramirez, who worked the second shift, brought the file cabinet back in. On a Friday about a week before claimant left work at respondent, he and Gilbert Ramirez had a confrontation wherein Gilbert Ramirez accused claimant of causing problems in the creel room. However, claimant testified that Gilbert Ramirez apologized to him the next Monday.

When he left work on October 29, 2004, claimant went directly to the office of his personal physician and asked for an off-work slip because he was angry, anxious and afraid he might hurt someone. Claimant testified that he wants to return to work for respondent because he is not far from retirement. He testified that his symptoms are getting better.

Robert Ramirez testified that he is acquainted with claimant from working with him in the same department at respondent. Mr. Ramirez testified that he moved to the first shift in January 2003 and had his first confrontation with claimant in December 2003. Concerning the December 2003 incident, Mr. Ramirez testified he made a comment to claimant about production in the creel room and claimant got upset. Mr. Ramirez at first thought claimant was joking but soon realized he was serious. Claimant said something about going some rounds with Mr. Ramirez. Claimant told a supervisor about the incident, and both Ramirez and claimant were suspended for the rest of the day. Mr. Ramirez testified he never threatened claimant during this incident.

Mr. Ramirez testified that after this, several times a week claimant would walk by him and give him a nudge and a threatening look. Ramirez reported these incidents to his supervisor.

Mr. Ramirez testified that he never knew claimant had a sensitivity to smells and never knew janitors were told not to use deodorizers or disinfectants in claimant's work area. He testified he never sprayed the creel room or any other area with aerosol spray

or deodorizers. He never spilled Wick deodorizer in a filing cabinet, although he heard of the incident and admitted he heard he was being accused of doing it. Mr. Ramirez stated that claimant confronted him about a telephone call that had not been passed on to claimant but denied he ever took any telephone calls for claimant.

In a letter addressed to claimant's attorney and made an exhibit to the preliminary hearing transcript, Dr. Silverman stated that claimant is a Vietnam veteran suffering from post traumatic stress disorder (PTSD). Dr. Silverman stated that claimant had been able to keep the symptoms of PTSD to a minimum by avoiding conflict and isolating himself from people. Dr. Silverman further stated:

Unfortunately, the actions of Mr. Hargraves' co-worker led to a recurrence of many symptoms of PTSD. This was because Mr. Hargraves felt like he was under assault by his co-worker but was unable to fight back in any way. Mr. Hargraves had to avoid physically confronting this co-worker, but was unable to stop the assault. Mr. Hargraves displayed many features of PTSD as a result of the actions of his co-worker. These included insomnia, irritability, fatigue, avoiding people (including his family members), constant intrusive thoughts about the situation at Goodyear and depressed mood.

Mr. Hargraves' co-worker apparently sprayed chemicals deliberately, knowing that the chemicals would cause harm to Mr. Hargraves. This type of assault is sufficient to lead to a recurrence of PTSD. Mr. Hargraves has not been able and currently is not able to work in the environment at Goodyear. It is difficult for me to project a date when he is able to return to work. However, I do anticipate that he will eventually be able to return to work so long as he is not subject to any further types of assault.<sup>2</sup>

The ALJ found that claimant met "with personal injury by accident which arose out of and in the course of employment as a result of inhaling fumes at work."<sup>3</sup> He further found that "it was the physical injury that triggered the overt manifestation of the psychiatric problem that resulted in the Claimant leaving his employment . . . ."<sup>4</sup> This conclusion is supported by the expert opinion of Dr. Silverman, who said it was the spraying of chemicals by a co-worker knowing that the chemicals would cause harm to claimant, followed by claimant's inability to stop the co-worker's actions, that led to a recurrence of claimant's

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<sup>2</sup>P.H. Trans., Cl. Ex. 3 at 1.

<sup>3</sup>ALJ Award (May 27, 2005) at 1.

<sup>4</sup>*Id.* at 3.

preexisting PTSD. The Board agrees with and affirms the ALJ's award of preliminary benefits for the work-related aggravation of claimant's mental disorder.<sup>5</sup>

Claimant contends he is not at maximum medical improvement and, accordingly, the ALJ erred by finding claimant's condition was permanent and, therefore, his entitlement to TTD ended. Claimant asks the Board to extend the award of TTD compensation "until Claimant reaches maximum medical improvement or returns to work or further order of the ALJ."<sup>6</sup>

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an ALJ exceeded his or her jurisdiction.<sup>7</sup> This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.<sup>8</sup>

The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>9</sup>

The ALJ has the jurisdiction and authority to grant or deny TTD benefits at a preliminary hearing. Therefore, the ALJ did not exceed his jurisdiction. Whether claimant has reached maximum medical improvement and whether his condition should be considered temporary or permanent are not issues that are reviewable from a preliminary hearing order.

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<sup>5</sup> See *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, rev. denied 265 Kan. 884 (1998).

<sup>6</sup> Claimant's Response to Respondent/Appellant's Brief at 3 (filed July 8, 2005).

<sup>7</sup> K.S.A. 44-551.

<sup>8</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 675, 994 P.2d 641 (1999).

<sup>9</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

Accordingly, the Board concludes that it does not have jurisdiction at this juncture of the proceedings to review whether the ALJ erred in denying claimant TTD compensation after April 13, 2005.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon full hearing on the claim.<sup>10</sup>

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated May 27, 2005, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2005.

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant  
John A. Bausch, Attorney for Respondent and its Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>10</sup>K.S.A. 44-534a(a)(2).